

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA
SAN FRANCISCO DIVISION

U.S. Ethernet Innovations, LLC,
Plaintiff,

NO. C 10-03724 JW
NO. C 10-05254 JW
NO. C 10-03481 JW

v.

**ORDER GRANTING MOTION TO
STRIKE; DENYING MOTION FOR
ORDER SHORTENING TIME**

Acer, Inc., et al.,
_____/

AT&T, Inc., et al.,
_____/

Defendants.

Zions Bancorporation, et al.,

Plaintiffs,

v.

U.S. Ethernet Innovations, LLC,

Defendant.

Presently before the Court are: (1) Defendants' and Intervenor's Motion to Strike
Declaration of Dr. Michael Mitzenmacher;¹ and (2) Defendants' and Intervenor's Motion to Shorten

¹ (hereafter, "Motion to Strike," Docket Item No. 560 in No. C 10-3724 JW.)

1 Time for a hearing on their Motion to Strike.² Based on the briefings submitted thus far on these
 2 issues, the Court finds that it can adjudicate the Motions without the necessity of further briefing or
 3 a hearing at this time. See Civ. L.R. 7-1(b).

4 Pursuant to Federal Rule of Civil Procedure 12(f), “the court may order stricken from any
 5 pleading any insufficient defense or any redundant, immaterial, impertinent, or scandalous matter.”
 6 The Ninth Circuit has held that “[t]he function of a 12(f) motion to strike is to avoid the expenditure
 7 of time and money that must arise from litigating spurious issues by dispensing with those issues
 8 prior to trial.” Sidney-Vinstein v. A.H. Robins Co., 697 F.2d 880, 885 (9th Cir. 1983) (citation
 9 omitted).

10 Here, Defendants move to strike the declaration of Dr. Mitzenmacher which Plaintiff has
 11 included in its opening claim construction briefing to support its proposed definitions regarding
 12 disputed claim terms. (Motion to Strike at 2.) As the Court explained in its September 7 Order, the
 13 Court’s Patent Scheduling Order clearly provides that “[n]o testimony will be allowed” at any Claim
 14 Construction Hearing “unless the Court orders otherwise[] based upon a timely motion noticed for
 15 hearing at least 10 days prior to the Claim [Construction] Hearing.”³ In its September 7 Order, the
 16 Court stated that the parties would not be permitted to call witnesses or present extrinsic evidence at
 17 the Markman hearing, because no party had timely noticed a motion seeking to present testimony at
 18 that hearing. (Id.) To date, Plaintiff has not tendered such a motion before the Court. Because
 19 Plaintiff will not be permitted to present Dr. Mitzenmacher or his testimony at the Markman hearing,
 20 it necessarily follows that Plaintiff cannot rely on Dr. Mitzenmacher’s testimony to support its
 21 proposed definitions for the disputed terms. Thus, the Court will not consider this extrinsic evidence

22 ² (Defendants’ and Intervenor’s L.R. 6-3 Motion for Order Shortening Time for Briefing on
 23 Motion to Strike Declaration of Dr. Michael Mitzenmacher, Docket Item No. 559 in No. C 10-3724
 24 JW.) Defendants and Intervenor’s move for an “expedition of the briefing schedule” on Defendants’
 25 Motion to Strike, on the grounds that “determining the admissibility of Dr. Mitzenmacher’s testimony
 26 is necessary for the Markman hearing scheduled for October 21, 2011, and thus, without an accelerated
 briefing schedule, the Court will not be able to consider Defendants’ [Motion to Strike] prior to the
Markman hearing.” (Id. at 1.)


27 ³ (Order Vacating Case Management Conference; Denying Motion to Strike at 3, hereafter,
 “September 7 Order,” Docket Item No. 547 in No. C 10-3724 JW.)

1 in defining the disputed terms. Further, the Court observes that in its Opposition to Defendants'
2 Motion to Shorten Time, Plaintiff admits that there is no need to expedite the briefing schedule on
3 the Motion to Strike, because the Court has already ordered that "no party may present live
4 testimony at the Markman [h]earing."⁴

5 Accordingly, the Court GRANTS Defendants' Motion to Strike the Declaration of Dr.
6 Michael Mitzenmacher.⁵ The Declaration of Dr. Mitzenmacher is ordered to be stricken from
7 Plaintiff's Opening Markman Brief, and is excluded from the Markman process. On or before
8 **October 14, 2011**, Plaintiff shall file and serve its Amended Claim Construction Statement
9 consistent with the terms of this Order.

10 In light of this Order, Defendants' Motion to Shorten Time is DENIED as moot.

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13 Dated: October 12, 2011



JAMES WARE
United States District Chief Judge

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25 ⁴ (Plaintiff's Opposition to Defendants' Administrative Motion to Shorten Time for Briefing
26 on Motion to Strike Declaration of Dr. Michael Mitzenmacher at 1-2, Docket Item No. 562 in No. C 10-
3724 JW.)

27 ⁵ (Docket Item No. 552-11.)
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United States District Court

For the Northern District of California

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United States District Court

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20 **Dated: October 12, 2011**

Richard W. Wieking, Clerk

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22 By: /s/ JW Chambers

Susan Imbriani
Courtroom Deputy